ORIGINAL

No. 87 - 1234

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RICHARD L. DUGGER, Secretary
Florida Department of Corrections,

Petitioner,

- v -

WILLIAM DUANE ELLEDGE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

In ruling that the shackling of Mr. Elledge during his capital sentencing proceeding was "inherently prejudicial" in the peculiar circumstances of his case, and that he was thus entitled to the protections of due process before being tried in shackles, has the Eleventh Circuit done anything more than faithfully apply the Court's ruling in Holbrook v. Flynn, 106 S.Ct. 1340 (1986), in which the Court recognized that shackling is "inherently prejudicial" because of its tendency to impute dangerousness and untrustworthiness to the defendant without the necessity of proof, and that for this reason, "close judicial scrutiny" must be given before one can be subjected to trial in shackles?

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COUNTER-STATEMENT OF THE CASE

Respondent writes briefly to correct certain misimpressions conveyed by Petitioner's Statement of the Case. This is a rare case, in which the trial court ordered that a capital defendant be shackled during his capital sentencing trial based on third party hearsay, without affording the defendant an opportunity to be heard. Upon announcement by the trial court of its decision specific objections were made but were summarily ignored by the Court:

> THE COURT: I received information from Chief Miro yesterday, the Chief of Detention for the Broward Sheriff's Office.
>
> He told me he received information from two of the Lieutenants -- one in the jail, and one in the Detective Division -- that Mr. Elledge had become a karate expert, while in prison -- apparently; and he was going to attack my Bailiff, either on the way to the courtroom or in the courtroom, today, because he had nothing to lose -- he is now serving two life sentences, plus fifty years for rape; and he is facing a death penalty, or another life sentence, arising out of this situation; that he has been adjudged guilty of these particular crimes.
>
> In abundance of precaution, I entered an Order to leave Mr. Elledge in leg irons here in these proceedings.
>
> MR. McCAIN: For the record, the defense would object to it in the presence of the jury, having the belief it would unduly influence and prejudice the jury against the defendant.
>
> THE COURT: Fine. I think we ought to put it on the record.
>
> THE DEFENDANT: May I say something, your Honor.
>
> THE COURT: No, sir. We will be in recess.

4C-11.[1] Not only did counsel make a specific objection, but when Mr. Elledge himself asked permission to speak on the issue he was denied that right. Thereafter, the court recessed with no further discussion concerning the inherently prejudicial impact of shackling during a capital sentencing.

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[1] Citations to the record before the Eleventh Circuit are in the form prescribed by the Eleventh Circuit. If preceded by "R," the citations are to the record, followed by the record volume number, the item number on the Eleventh Circuit docket sheet, and the page numbers (as internally numbered) within the document. If preceded by a number, the citations are to the record exhibits, as numbered and designated by the Eleventh Circuit, followed by the page numbers (as internally numbered) within the exhibit.

To the extent that other material facts need to be highlighted, they are highlighted within the arguments presented herein.

SUMMARY OF ARGUMENT

1. Mr. Elledge was ordered to be shackled in leg irons during his capital sentencing jury trial without being afforded the opportunity to be heard as to the perceived need for such a measure or as to the prejudice he would suffer from it. Ruling that the shackling of Mr. Elledge was "inherently prejudicial" in the circumstances of his case, and that he was entitled to the protections of due process before being subjected to a capital sentencing trial in shackles, the Eleventh Circuit did no more than apply the Court's settled principles of analysis to this matter. The Eleventh Circuit ruled that the "inherent prejudice" found applicable by the Court to guilt/innocence trials applies to capital sentencing trials where shackling's plain message--"that the defendant is dangerous or untrustworthy," Holbrook v. Flynn, ____U.S.____, 106 S.Ct. 1340, 1346 (1986) -- cuts to the heart of the character analysis that is the essence of the life or death decision, solely on the basis of "circumstances not adduced as proof at trial." 106 S.Ct. at 1345. In this case "close judicial scrutiny" was not undertaken and no "essential state interest" was demonstrated, because the hearsay rumor relied upon by the judge for ordering shackling was not shown to be accurate, and the judge summarily refused Mr. Elledge's request to be heard in opposition to the shackling order. No significant, unsettled principle of law would be clarified, or conflicting lower court decisions resolved, by the Court's review of this question.

2. The final judgment of the Court of Appeals was correct as well, because the court should have granted the writ on the basis of the same error for which the Court unanimously granted relief in Hitchcock v. Dugger, ___U.S.___, 107 S.Ct. 1821 (1987). Consistent with the authoritative pre-Lockett application of the Florida capital sentencing statute, the trial judge here

constricted his and the jury's consideration of the mitigating features of the case to the statutory mitigating circumstances. The substantial nonstatutory mitigating evidence presented by Mr. Elledge was therefore not considered by the sentencer. There is no principled basis -- nor did the Eleventh Circuit find that there was -- for distinguishing Elledge from Hitchcock.

3. The final judgment of the Court of Appeals was correct as well, because the court should have granted the writ on the basis of Mr. Elledge's claim of ineffective assistance of counsel. Mr. Elledge claimed that he was deprived of effective assistance of counsel in his sentencing proceeding because of his attorney's unreasonable failure to investigate and present a psychiatric mitigation defense, which was his only defense against the death penalty. In Mr. Elledge's view, reasonable counsel would have sought the assistance of a competent psychiatrist and interviewed members of the family in order to demonstrate that he suffered from psychosis, brain damage, and the effects of an abused and battered childhood at the time of the homicide. Even though the Eleventh Circuit determined that the "performance" prong of Strickland v. Washington's ineffective assistance of counsel standard had been satisfied, it held that Mr. Elledge failed to demonstrate sufficient prejudice to warrant relief under Strickland for two reasons: his failure to show that if counsel had conducted a reasonable investigation he would have found a favorable psychiatrist, and his failure to convince the district judge that the psychiatric mitigating evidence would have outweighed the aggravating factors in this case. The Eleventh Circuit erred in its reasoning, because its first reason was flatly contradicted by the record, and its second reason misapplied Strickland's prejudice standard by approving the district judge's subjective assessment of the mitigating evidence as if he were the sentencer, rather than requiring that the evidence be assessed from the perspective of a reasonable juror. Had the record been read accurately and had the proper standard for assessing the effect of the unpresented mitigating evidence

been applied, the Eleventh Circuit would have concluded that Strickland's prejudice showing had been satisfied.

REASONS FOR DENYING A WRIT OF CERTIORARI

I.

THE COURT OF APPEALS' DECISION THAT SHACKLING MR. ELLEDGE IN IRONS BEFORE THE JURY IN HIS CAPITAL SENTENCING TRIAL DENIED A FAIR TRIAL ON THE ISSUE OF PUNISHMENT AND DUE PROCESS OF LAW IS CORRECT AND PRESENTS NO ISSUE CALLING FOR REVIEW BY THE COURT.

Mr. Elledge was shackled in irons throughout his capital sentencing trial before the jury. Dugger's attack on the Eleventh Circuit opinion is based upon the faulty premise that a capital defendant can have no interest that could be undermined by being forced to trial for his life while chained in irons. Dugger's extreme position would mean that every defendant in every courtroom in America could be chained down before the jury determining his sentence.

The Eleventh Circuit followed a simple middle ground that is easily applied and consistent with other areas of the law where interests compete. The Court of Appeals established no per se rule, nor did it hold shackling to be forever forbidden. It simply said that if the defendant is to be shackled in irons before the jury, the judge must first give the defense an opportunity to challenge the basis of that decision if he asks to do so. This makes perfect sense. It burdens no one and does not threaten or ignore security needs.

In this case the judge announced his decision to keep Mr. Elledge in irons, relying on what essentially was three step hearsay. Defense counsel objected on the basis that the shackling would be prejudicial, and Mr. Elledge asked to speak, but the judge summarily refused that request. There was no hearing and thus no testing or corroboration of the treble hearsay used by the judge to sua sponte shackle Mr. Elledge. The irons were clamped down with no way of knowing truthfully whether Mr. Elledge had "become a Karate expert, while in prison" or had told someone he was going to attack a bailiff on the way to court. Mr. Elledge could have rebutted that hearsay but was refused the opportunity to do so. Mr. Elledge was chained down

on the basis of rumor, no more, and rebuffed in his attempt to contradict that rumor.

The Court of Appeals chose a reasonable course without the dire consequences posed by Dugger.[2] Courtroom security is not threatened, nor is it much burdened by a procedure permitting a defendant a due opportunity to oppose his chaining.

The Court of Appeals recognized that "shackling" a defendant at trial is the "sort of inherently prejudicial practice that ... should be permitted only where justified by an essential state interest specific to each trial." Holbrook v. Flynn, ___U.S.___, 106 S.Ct. 1340, 1346 (1986). A-53; 823 F.2d at 1451. Further, this inherently prejudicial practice "pose[s] such a threat to the 'fairness of the fact-finding process' that [it] must be subjected to 'close judicial scrutiny.'" Id. at 1345 (quoting Estelle v. Williams, 425 U.S. 501, 503-504 (1976)). Here, Mr. Elledge was shackled during his sentencing trial, but he was refused even the most minimal hearing on whether there was a factual basis to justify this inherently prejudicial security measure. Because this security measure was as "inherently prejudicial" in his sentencing trial as it would have been in a guilt-innocence trial, the trial court's failure to determine that it was in fact justified by an essential state interest deprived Mr. Elledge of the fair sentencing determination guaranteed by the Eighth Amendment and the Due Process Clause.

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[2] The dissent below and petitioner herein have argued that the majority established a per se rule. That argument misreads the opinion below. What the Court of Appeals said was that in some cases shackling the defendant might have a neutral effect or even a beneficial effect on the jury. A-50; 823 F.2d at 1450. In some cases, however, shackling can serve as "first hand evidence of future dangerousness and uncontrollable behavior." Id. It was only on this question of help versus harm that the Court of Appeals said a case-by-case analysis was inappropriate. Id. It said that the constitutional test established by this Court for shackling a defendant should be followed when shackling is proposed, without resorting to guesswork as to whether shackling could actually help the defense. This approach too makes sound sense since, if chaining the defendant is actually helpful to the defense, it presumably will not be objected to by the defense. In any event, all the Court of Appeals said was that "close judicial scrutiny" must be given whenever shackling is proposed, and that in this case since any challenge was rebuffed there was no such scrutiny and there could not be because the facts are unproven and and untested.

At the commencement of Mr. Elledge's resentencing trial the trial judge announced for the record that he had sua sponte entered an order requiring that Mr. Elledge be shackled in leg irons throughout the trial. 4C-11. The judge's reason for this action was the rumor

> that Mr. Elledge had become a Karate expert, while in prison -- apparently; and he was going to attack my Bailiff ... on the way to the courtroom, today, because he had nothing to lose....

Id. The "information" upon which the judge based his order was double or triple hearsay, for it had been relayed to him by the chief of detention of the sheriff's office, who in turn had received the information from two lieutenants in the sheriff's office. Id. Where those lieutenants received such information is unknown. None of the alleged sources of this information was brought forward to testify or in any way substantiate the bare allegation. And even though defense counsel objected to the judge's order, and Mr. Elledge personally requested to be heard concerning the order, he refused to hear from Mr. Elledge or to conduct any evidentiary inquiry into the basis for the order. Id.

The question raised by Dugger is whether shackling during a capital sentencing trial is governed by the Fourteenth Amendment standards that govern such a practice in a guilt/innocence trial. Since Mr. Elledge was no longer presumed to be innocent, Dugger reasons, he had no interests at stake in the capital sentencing trial. Dugger reasons therefore that constitutional principles do not apply. Apart from the broad sweep of that reasoning -- permitting every capital defendant to be paraded in irons at sentencing under the logic that he is no longer presumed innocent -- such reasoning misperceives both the nature of the capital sentencing determination and the scope of the "inherent prejudice" identified as threatening the due process right to a fair trial. "[T]he question must be ... whether 'an unacceptable risk is presented of impermissible factors coming into play.'" Holbrook v. Flynn, 106 S.Ct. at 1347 (quoting Estelle v. Williams, 425 U.S. at 505).

A capital defendant has a right guaranteed by "the Due

Process Clause of the Fourteenth Amendment ... [to] a fair trial on the issue of punishment." Green v. Georgia, 442 U.S. 95, 97 (1979). Thus, even though a capital defendant does not retain a "presumption of innocence" at the capital sentencing trial, he does retain the important due process right of having his sentence "'determined solely on the basis of evidence introduced at trial, and not on grounds of official suspicion ... or other circumstances not adduced as proof at trial.'" Holbrook v. Flynn, 106 S.Ct. at 1345 (quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).[3]

While a defendant may not be presumed innocent at his capital sentencing trial, he is accorded a presumption that life is the appropriate sentence, that does not leave him "unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death." § 775.082(1), Fla. Stat. (1977). The capital sentencing trial under Florida law "resemble[s] and, indeed, in all relevant respects [is] like ... [a] trial on the issue of guilt or innocence. It [is] itself a trial on the issue of punishment." Bullington v. Missouri, 451 U.S. 430, 438 (1981). This is so because the state is assigned "the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative [punishments]." Id. A capital sentencing trial therefore has all of "the hallmarks of the trial on guilt or innocence." Id. at 439.[4]

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[3] This due process mandate is echoed by the Eighth Amendment restrictions applicable to capital sentencing. Because of the greater need for reliability in the determination of sentence in a capital proceeding, due process requires that "any evidence on which the jury might have relied" as an aggravating factor "[be] properly adduced at the sentencing hearing and ... fully subject to explanation by the defendant." Zant v. Stephens, 462 U.S. 862, 887 (1983). See also Gardner v. Florida, 430 U.S. 349 (1977).

[4] Every major feature of the Missouri penalty trial relied on in Bullington is also present under the Florida procedure: the clear-cut choice between only two sentencing alternatives; the requirement that the jury base its choice upon the evidence, guided by detailed legal standards; the requirement that the state prove the proffered aggravating circumstances beyond a reasonable doubt; the presentation of evidence by both

Before a death sentence can even be considered by the jury or judge in Florida, therefore, the state must prove two "elements," State v. Dixon, 283 So.2d at 9: first, that at least one statutory aggravating circumstance exists beyond a reasonable doubt, and second, that the aggravating circumstances outweigh the mitigating circumstances. Arango v. State, 411 So.2d 172, 174 (Fla. 1982). These are "threshold" matters of proof -- the burden of which Arango holds must be borne by the state -- before the sentencer can even consider whether to recommend or impose a death sentence. See Barclay v. Florida, 463 U.S. 939, 961-63 (1983) (Steven, J., joined by Powell, J., concurring). If the state fails to carry this burden in Florida, a life sentence must be imposed. Id. at 962 n.4. Just as the assignment of the burden of proof to the state in the guilt phase of the trial corresponds with the presumption of innocence accorded the defendant, see Sandstrom v. Montana, 442 U.S. 510, 522-24 (1979); In re Winship, 397 U.S. 358, 363-64 (1970); Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 404-405 (1895), the assignment of the burden of proof to the state in the capital penalty trial corresponds with -- and indeed protects -- the presumption that, before the state carries its burden, the proper sentence is life, not death.[5]

Shackling is "inherently prejudicial" because it erodes the presumption that life is the appropriate sentence -- not "'on the basis of evidence adduced at trial,'" Holbrook v. Flynn, 106 S.Ct. at 1345, but on the basis of "'circumstances not adduced as proof at trial.'" Id. Shackling the capital defendant in the sentencing trial cuts to the heart of the jurors' life and death inquiry, for it "create[s] the impression in the minds of the

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sides; opening and closing arguments by counsel; jury deliberations; and a formal verdict. Compare Bullington, 451 U.S. at 438 & n.10, with § 921.141(1) & (2), Florida Statutes; Florida Rule of Criminal Procedure 3.780; State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

[5] The "use of the reasonable-doubt standard indicates that in the capital sentencing proceeding, it is the state, not the defendant, that should bear 'almost the entire risk of error.'" Bullington, 451 U.S. at 446 (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)).

jury that the defendant is dangerous or untrustworthy.'" Holbrook v. Flynn, 106 S.Ct. at 1346 (quoting Kennedy v. Cardwell, 487 F.2d 101, 108 (6th Cir. 1973)) (emphasis supplied).

The questions of dangerousness and trustworthiness are just as much at issue in a capital sentencing trial as in a guilt/innocence trial -- even more so where jurors attempting to decide life or death may find assessment of the danger posed by the defendant to be a key inquiry.[6] Without the introduction of any evidence of dangerousness by the prosecution, however, the appearance of the defendant in shackles quite clearly tells the jury that the appropriate sentence is death because the defendant cannot be trusted to refrain from dangerous conduct in the present, much less in the future. As noted in Kennedy v. Cardwell,

> When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers.

487 F.2d at 105-106 (quoting State v. Kring, 64 Mo. 591, 593 (1877)).[7] There can be no genuine question therefore that the

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[6] As the Court has recognized:

> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted persons' probable future conduct when it engages in the process of determining what punishment to impose."

Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986) (quoting Jurek v. Texas, 428 U.S. 262, 275 (1976)). Moreover, the prediction of "probable future behavior" can cut either way. If the prediction is of future dangerousness, it will be aggravating. See Barefoot v. Estelle, 463 U.S. 880 (1983); California v. Ramos, 463 U.S. 992 (1983). But if the prediction is "that the defendant would not pose a danger if spared (but incarcerated) [it] must be considered potentially mitigating." Skipper v. South Carolina, 106 S.Ct. at 1671 (footnote omitted).

[7] While simply and effectively conveying such a message about the defendant, shackling thus mounts a general assault on character -- the essential issue. As the Florida court emphasized in Mr. Elledge's own case, "the purpose for considering [evidence of] aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the death penalty is called for in his or her particular case." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977) (emphasis supplied). The prosecutor here

appearance of Mr. Elledge shackled in irons at his sentencing trial flatly contradicted the presumption operative at that point -- that the State was required to overcome by the introduction of evidence -- that life was the appropriate sentence for him.[8]

The Court of Appeals also recognized another important consideration in shackling criminal defendants in American courtrooms. Apart from the "'significant effect on the jury's feelings about the defendant ... this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" A-52-53; 823 F.2d at 1451 (quoting Illinois v. Allen, 397 U.S. 337, 344 (1970)). In short it is not a decision to be lightly made. The summary authority sought by Dugger fails to acknowledge the importance of that decision.

Accordingly, the shackling of Mr. Elledge throughout his sentencing trial was as "inherently prejudicial" as it would have been in a guilt/innocence trial, and is thus governed by the due process requirements of a fair trial. The Court of Appeals was correct in holding that to justify the shackling of Mr. Elledge, the state must show an "essential state interest" compelling such an extreme action, and that practice must be subjected to "close judicial scrutiny." Holbrook v. Flynn, 106 S.Ct. at 1345.

The Court of Appeals found that under the procedures in this

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was favored by an assault on Mr. Elledge's character, without the necessity of introducing evidence.

[8] As we have shown, therefore, it is no answer to say that the appearance of Mr. Elledge in shackles was harmless because he already stood convicted of homicide. While the state could have argued that Mr. Elledge was dangerous and likely to be so in the future solely on the basis of his past convictions, the prediction of dangerousness solely on this basis is unreliable and easily countered. See Barefoot v. Estelle, 463 U.S. at 896-902. In order to have presented compelling evidence of future dangerousness -- particularly where as here the defendant proffered evidence of his remorse and commitment to rehabilitation, see 5C-337-343, evidence of his future non-dangerousness -- the state would have had to present additional evidence, beyond the mere fact of prior convictions. The appearance of Mr. Elledge in shackles gave the state just such evidence, however, relieving it of the burden to produce it. For this reason the shackling of Mr. Elledge created "'an unacceptable risk ... of impermissible factors coming into play,'" Holbrook v. Flynn, 106 S.Ct. at 1347, through the impermissible advantage given to the state by the appearance of Mr. Elledge in shackles.

case, no such showing of a compelling state interest was made and no "close judicial scrutiny" was undertaken of the rumor purporting to require Mr. Elledge's restraint, because the trial judge refused Mr. Elledge's objection and request to be heard in opposition on the question. In Zygadlo v. Wainwright, 720 F.2d 1221 (11th Cir. 1983), cert. denied, 466 U.S. 941 (1984), the Court of Appeals explained that even in light of the limited scope of federal habeas review,

> we do not conclude that the due process clause would not have required an evidentiary hearing here had Zygadlo requested one. We note, however, that Zygadlo did not dispute the factual basis of the judge's decision or request such a hearing and that he suggested to alternative or less obtrusive means of restraint.

Id. at 1224. See also Allen v. Montgomery, 728 F.2d 1409, 1413 n.4 (11th Cir. 1984) (citing Zygadlo for the principle that "due process may require such a hearing if requested by a defendant in a state trial" but noting that Allen did not request such a hearing). As suggested in these opinions, in the proper circumstances, due process requires that an evidentiary hearing be held because a right as fundamental as a fair trial is at stake by the "inherently prejudicial" state action. Where a fundamental right is at stake basic due process must be met before the state may take it away. And the most basic element of due process of law is the right to be heard.[9] Such a hearing is also a prerequisite to the trial court's undertaking close judicial scrutiny of the need for restraint, and to the ability of an appellate court to review the trial court's decision, for without some record there is no way for a reviewing court to evaluate the necessity of shackling the defendant.[10] Cf. Gardner

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[9] See, e.g., Goss v. Lopez, 419 U.S. 565, 579-81 (1975)(citing cases); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("[t]he fundamental requisite of due process of law is the opportunity to be heard"); Baldwin v. Hale, 68 U.S. (1 Wall.) 531, 534 (1864) ("[p]arties whose rights are to be affected are entitled to be heard...").

[10] To the extent that Dugger's argument that Mr. Elledge was a dangerous person implies that the decision to shackle would have been the same even if he had been provided the opportunity to challenge the decision, the argument is misplaced. "'[I]t is no answer to say in his particular case due process of law would have led to the same result because he had no adequate defense on

v. Florida, 430 U.S. at 361.

Accordingly, Mr. Elledge should have been provided a fair and reasonable determination by the trial judge that his shackling in irons throughout his jury sentencing trial was necessary. Zygadlo v. Wainwright, 720 F.2d at 1223. However, the trial judge did not make such a determination. He did not know whether the facts alleged to require restraint -- that Mr. Elledge had learned karate and planned to assault the bailiff -- were true. He was not acquainted with these facts of his own knowledge, cf. Zygadlo, 720 F.2d at 1222, nor did he conduct a fact-finding inquiry to determine even how the sheriff's deputies "knew" of these facts. Faced with Mr. Elledge's personal attempt to contradict these facts, the trial judge summarily cut off Mr. Elledge.[11] Thus, in a very real sense the trial judge did nothing more than "defer[] to the [hearsay] opinion of law enforcement officials," Zygadlo v. Wainwright, 720 F.2d at 1223 n.5 (citing Woodards v. Cardwell, 430 F.2d 978, 981-82 (6th Cir. 1970)), which, of course, cannot be a substitute for due process. See United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1980); State v. Moen, 94 Idaho 477, 481 P.2d 858, 860 (1971); Bowers v. State, 507 A.2d 1072 (Md. 1986), cert. denied, ___U.S.___, 93 L.Ed.2d 395 (1986).

Such a process of decision-making does not provide the fair and reliable determination of the necessity demanded by due process for shackling Mr. Elledge during his life and death trial. The Court need go "no further ... [to] conclude[] that the practice is unconstitutional." Holbrook v. Flynn, 106 S.Ct. at 1345.

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the merits'.... [O]nly 'wip[ing] the slate clean ... would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.'" Peralta v. Heights Medical Center, Inc., 56 U.S.L.W. 4189, 4190-91 (February 24, 1988) (citations omitted).

[11] Dugger insinuates that Mr. Elledge's request to speak regarding the shackling ordered by the judge should not be equated with a request for a due process hearing. The logic of this argument is elusive, however, for what is a request for a hearing if it is not a request to be heard? There is no requirement in the law of an incantation of certain magic words before the Due Process Clause may be invoked.

The Court of Appeals' reasonable opinion presents no issue needing review by the Court.

II

THE JUDGMENT OF THE COURT OF APPEALS IS SUPPORTED INDEPENDENTLY BY A VIOLATION OF HITCHCOCK V. DUGGER, 107 S.CT. 1821 (1987), DENYING THE EIGHTH AMENDMENT MANDATE OF INDIVIDUALIZED CONSIDERATION IN CAPITAL SENTENCING.

There is an independent basis, left undecided in the final opinion below, that requires the same relief granted by the Court of Appeals: a violation of Hitchcock v. Dugger, ___U.S.___, 107 S.Ct. 1821 (1987). For this reason, even if the Court were inclined to grant Dugger's petition, it would ultimately determine that the judgment of the Eleventh Circuit -- granting the writ and requiring a new sentencing proceeding -- must be sustained. Certiorari should not be granted in these circumstances.[12]

The unanimous opinion in Hitchcock recognized the restriction in Florida law that precluded consideration of all but a narrow statutory listing of mitigating circumstances in determining the appropriate sentence. This statutory limitation existed in Florida law through late 1978 until the Florida court announced its decision in Songer v. State, 365 So.2d 696 (Fla. 1978), which was its first response to Lockett v. Ohio, 438 U.S. 586 (1978). The application of the Florida law's constraint on individualized consideration was seen in Mr. Hitchcock's case in the jury instructions, the prosecutor's argument and in the judge's sentencing order. Hitchcock, 107 S.Ct. at 1824. The Court found in Hitchcock that "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing

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[12] The Court has long held that the prevailing party need not cross-petition or cross-appeal in order to "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it." United States v. American Railway Express Co., 265 U.S. 425, 435-36 (1924)(cited in Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970)). See also, Dayton Board of Education v. Brinkman, 433 U.S. 406, 419 (1977); Swarb v. Lennox, 405 U.S 191, 202 (1972)(White, J., concurring).

judge refused to consider, evidence of nonstatutory mitigating circumstances...." Id.

Mr. Elledge's sentencing trial was held in August, 1977, the same time period as Mr. Hitchcock's (February, 1977). Mr. Elledge's sentencing contains the same restrictions upon the consideration of nonstatutory mitigating factors. It thus reveals the same Eighth Amendment violation from the denial of individualized sentencing.

The Court of Appeals' final opinion in this case omitted all discussion of the Hitchcock issue. The court had originally denied relief on this question because it believed that there was some indication in the record that the sentencing judge did not feel limited by the statute and thus the restrictions upon the jury were not determinative. It found "Hitchcock inapplicable," A-40; 823 F.2d at 1448, because in Florida the jury is "merely advisory" and "[t]he trial judge, alone, makes the ultimate decisions as to sentencing in capital cases," A-42; 823 F.2d at 1439. A week after announcing its opinion in this case, another panel of the Eleventh Circuit issued an opinion rejecting the reasoning applied by the Elledge panel. Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987) (such reasoning "would ignore the importance of the advisory jury to the Florida sentencing scheme" for "[u]nder Florida law, a capital defendant is entitled to have a sentencing proceeding before a jury[;] [a] defendant is no less entitled to that advisory jury sentence merely because his original sentencing proceeding was infected by constitutional error").[13]

Mr. Elledge on rehearing pointed out the conflict with Magill and perhaps more importantly the conflict with Florida law. The panel thereafter deleted entirely the discussion of the Hitchcock issue from the Elledge opinion and otherwise denied

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[13] Other than its now-vacated language in the initial opinion in this case, the Eleventh Circuit has never followed such reasoning in reviewing Hitchcock error. Stone v. Dugger, No. 86-3644 (11th Cir. 1988); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987); Messer v. State of Florida, 834 F.2d 890 (11th Cir. 1987); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (en banc); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987).

rehearing and rehearing en banc. A-85; 833 F.2d at 250. It was unnecessary for the Court of Appeals to reach the Hitchcock question because it was granting relief as to another sentencing issue requiring identical relief.

Nevertheless, although not reached in the final opinion, Hitchcock error occurred in this case and would independently support the judgment below. In this case the sentencing judge opined prior to the commencement of the sentencing trial that he "had to stick just to the statutory circumstances" in responding to defense counsel's argument that he should be able to present evidence concerning "the advantages and disadvantages of capital punishment." 4C-6. In accord with the view that only statutory mitigating circumstances could be considered, during the voir dire when defense counsel asked prospective jurors whether they would be willing to consider the fact that "Billy has pleaded guilty" in mitigation, the sentencing judge sustained the prosecutor's objection and charged the jury: "I will instruct you as to what you are to consider at the end." 4C-79-80. Throughout the voir dire the prosecutor sought agreement from prospective jurors that they would "follow the law as his Honor, Judge Futch, gives you at the end of the circumstances...." 5C-122; see also 4C-26, 30, 33, 36.

The instructions given thereafter were "virtually identical to those in Hitchcock." A-41; 823 F.2d at 1449. Prior to the sentencing trial, the judge told the jury:

> At the conclusion of the taking of the evidence, and after the arguments of counsel, then you will be instructed on the factors in aggravation and mitigation that you may consider.

4C-198 (emphasis supplied). The corresponding jury instruction in Hitchcock was that "he [the judge] would instruct them 'on the factors in aggravation and mitigation that you may consider under our law.'" 107 S.Ct. at 1824.

At the close of evidence and argument the judge charged the jury in part that: "The mitigating circumstances which you may consider, if established by the evidence, are these: [statutory listing]." 5C-389. The jury's verdict was to be "[b]ased on

these considerations." 5C-390. The corresponding instruction in Hitchcock did not differ in substance: "'[t]he mitigating circumstances which you may consider shall be the following...' (listing the statutory mitigating circumstances)." 107 S.Ct. at 1824.

And there was more. In opening statement the prosecutor told the jurors:

> Ladies and gentlemen, as I said, we are limited by the aggravating circumstances. Of course, Mr. McCain, the defense lawyer, is limited by the mitigating circumstances.

5C-203 (emphasis supplied). In closing argument the defense lawyer did not disabuse the jury of the limits on mitigating circumstances when he said:

> When you are instructed on the mitigating factors, I would ask you to listen carefully, and to study the mitigation in this case.
>
> The death statute, or the penalty statute, which is part of an instruction which will be read to you--and, when you listen to that instructions, I would like for you to consider and think about these things.

5C-382-83 (emphasis supplied). Defense counsel nevertheless argued mitigation that cannot fairly be described as falling in the narrow statutory list; however, he tried to shoehorn these circumstances into the statutory listings. He explained the purpose of his above-quoted argument telling the jury to listen to the statute's factors because "with the mitigating factors, I suggest to you that all the mitigating factors -- and, there are several, almost all ... apply to the factual situation and the attitude of Billy Elledge." 5C-382 (emphasis supplied). In short, defense counsel was trying to show that the statutory listing of mitigation was applicable.

Considering the status of Florida law at the time of this proceeding as acknowledged by the Court in Hitchcock, it is not surprising that the prosecutor, defense lawyer, and judge were operating under the law's restriction on consideration of mitigating aspects of the case.

The record in Mr. Elledge's case is virtually the same as that which in Hitchcock led the unanimous Court to conclude "the

proceedings did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ____ (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion)." 107 S.Ct. at 1824.

In Mr. Elledge's case "it could not be clearer that the advisory jury was instructed not to consider ... evidence of nonstatutory mitigating circumstances." Hitchcock, 107 S.Ct. at 1824. The only question that has ever been raised in this case is whether the judge also followed the restrictive application of the statute. The record as a whole in this case does show that the judge did restrict his own consideration so as to exclude nonstatutory mitigation. More importantly, however, because of the importance given to the jury by Florida law, even if the record demonstrated that the judge did not restrict himself, it would not be determinative of the Eighth Amendment violation.

The judge's views in this case were expressed at the very beginning of this trial when he said he "had to strick just to the statutory circumstances," when defense counsel was asking to present evidence that plainly fell outside the scope of the statutory mitigating circumstances. 4C-6. Then when counsel asked prospective jurors whether they could consider the fact that Mr. Elledge entered a plea of guilty in mitigation, the judge sustained the prosecutor's objection and told the jurors, "I will instruct you as to what you are to consider at the end." 4C-80. As set out above, both in preliminary and final instructions, the judge restricted the jury to the statutory listing of mitigation.[14] Thereafter, in his findings in support of the death sentence, the judge referred only to the statutory mitigating factors with no discussion of any of the family or life history evidence that formed the basis of Mr. Elledge's proffered mitigation. 5C-398-99; 2C-26-29. The judge reviewed the evidence regarding Mr. Elledge's diminished mental condition

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[14] Cf. Rogers v. Richmond, 365 U.S. 534, 541-42 (1961) (treating the trial judge's jury instructions as indicating the standard the judge himself must have used in determining voluntariness of a confession).

only under the narrow statutory definitions (i.e., "extreme mental or emotional disturbance") and thereby rejected its consideration entirely, as a matter of law. 2C-27.

Although this record is enough to show that the judge acted under the Hitchcock constraint, Mr. Elledge also presented record showings from other cases involving the same sentencing judge. In a case tried prior to Mr. Elledge's resentencing, but during the same pre-Lockett time period, the death sentence was reversed where the Florida Supreme Court found that the same sentencing judge "held the mistaken belief that he could not consider nonstatutory mitigating circumstances." Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). The same trial judge also presided over the case of James Franklin Rose v. State of Florida,[15] where the death sentence was imposed just three months prior to Mr. Elledge's trial. The trial record in that case plainly demonstrates the effect of the judge's belief. In addressing the nonstatutory mitigating circumstances (family background) that had just been argued by defense counsel in Rose, the same trial judge ruled:

> THE COURT: A lot of things that you said I agree with, Mr. Bush [defense counsel]. But there are a lot of things that the Court is not able to take into consideration. And mothers are not listed under mitigating circumstances.
>
> * * *
>
> THE COURT: [T]his Court is restricted to those items designated by the legislature.

R4-48-Appendix at 15 (emphasis supplied).[16] There can be little doubt that this judge was operating under the settled law at the time that consideration of mitigating factors was strictly confined to the statutory list.

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[15] The death sentence in Rose was later reversed on a ground not relevant here. Rose v. State, 425 So.2d 521 (Fla. 1983).

[16] The Court of Appeals thought these other cases were unpersuasive because they did not "sandwich" the trial in this case. A-44; 823 F.2d at 1449. There is nothing, however, to indicate that anything occurred in the three months between the Rose trial and this case to disabuse the judge of his belief that the statutory mitigating circumstances were the only ones to be considered.

The now-withdrawn opinion below, despite these record showings of the judge's restriction, seized upon a phrase used by the judge during trial as being "an affirmative statement by the state trial judge that indicates he did not feel he was limited to the statutory mitigating factors." A-41-42; 823 F.2d at 1449.[17] Out of context the statement referred to by the Court of Appeals seems very broad: "I don't think I am limited on mitigation to a specific statute." 5C-246. In context, however, the statement has an entirely different meaning than that attributed to it by the Court of Appeals' panel. There was no question of statutory versus nonstatutory mitigation being discussed when the judge made that statement. Rather, the objection the court was answering had to do with hearsay and with whether the defense could introduce the evidence during the prosecution's case. The "statute" referred to by the judge most likely was the portion of the statute permitting hearsay evidence to be introduced in capital penalty proceedings (§ 921.141(1), Fla. Stat. (1977)).[18] The reading of this statement given by the

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[17] The standard of review applied by the lower court's original opinion is in this respect quite different from that previously applied by that court and suggested by this Court. Previously the Court of Appeals said its task was to "determine whether or not there is any indication that the sentencing judge felt himself bound as a matter of law not to consider the mitigating circumstances." Johnson v. Wainwright, 806 F.2d 1479, 1484 (11th Cir. 1986), reh. en banc denied, 810 F.2d 208 (11th Cir. 1987). Also, as Justice O'Connor opined "we may not speculate as to whether the trial judge ... actually considered all of the mitigating factors ... [because] Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring).

[18] During the state's case, the defense sought to introduce a photocopy of a letter written by Mr. Elledge to the witness. The prosecutor objected "it is self-serving, and it is no exception to the hearsay rule." 5C-245. The court was concerned with two matters, the hearsay objection and that it was being offered by the defense during the prosecutor's side of the case. The court commented as follows:

> THE COURT: I think it is on the wrong side of the case. You have it identified.
>
> I would allow it to be admitted. I don't think I am limited on mitigation to a specific statute.
>
> I would allow it to be admitted on the defense side of the case. We are on the wrong side now.

5C-246. No one was speaking about relevancy or limitations on

lower court and the petitioner Dugger was imaginative but unavailing.

Even were it true that the jury was constrained but the judge was not, however, relief would still be required. Apparently the Court of Appeals would now agree since it withdrew its opinion in this case and has not since followed its reasoning. The jury is critical to the Florida capital sentencing scheme and thus errors occurring in the jury proceedings cannot and have not been deemed harmless simply because the judge is the final sentencer.[19]

That was precisely the holding of Magill v. Dugger, supra and its reasoning, based on Florida law, is persuasive. It is also the Florida Supreme Court's opinion. Riley v. Wainwright, 517 So.2d 656 (Fla. 1988). Both Magill and Riley involved situations where sentences had been imposed prior to Lockett, but

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mitigation at the time. The judge was ruling on two questions--the "wrong side of the case" and the hearsay question. As to the "wrong side" he said that the defense could have the exhibit identified for admission in its own case. His comment regarding the "specific statute" was his ruling on the hearsay objection.

[19] Without variance, where an error is found in the jury proceeding in capital sentencing, the Florida court reverses for resentencing before a new jury, regardless of the correctness of the judge's sentencing findings. There are two separate reasons for this application of Florida law. First, there is an independent right to a jury. From the earliest days of the statute, the right to a jury in a capital sentencing has been treated as being fully equivalent to the Sixth Amendment right to a jury in the guilt-innocence determination, e.g., Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974), and for any error before the jury Florida applies the review standard for constitutional errors articulated in Chapman v. California, 386 U.S. 18 (1967), see Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987). The right to a jury if impinged by error requires reversal, regardless of the judge's sentencing findings. See, e.g., Floyd v. State, 497 So.2d 1211 (Fla. 1986).

The second basis for the refusal to disregard jury errors is the "great weight" Florida gives to the jury's verdict. Florida views the jury as "the conscience of our communities," e.g., McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977), and "the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors," Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976). Therefore, the Florida court now says it will not "countenance the denigration of the jury's role," nor "condone a proceeding which, even subtly, detracts from [the jury's] comprehensive consideration of aggravating and mitigating factors." Richardson v. Sate, 437 So.2d 1091, 1095 (Fla. 1983). It is this strong tradition of deference to the jury that gave life to the "significant safeguard [which] the Tedder standard," requires. Spaziano v. Florida, 468 U.S. 447, 465 (1984).

where resentencings had been ordered before the judge alone. The judge-only resentencings occurred after Lockett and therefore the sentencing judges were free to consider nonstatutory mitigation. Independently, the Eleventh Circuit in Magill and the Florida Supreme Court in Riley ordered resentencings due to Hitchcock error, because the jury had been limited in the original sentencing proceedings. Said Riley:

> Clearly, our prior cases indicate that the standards imposed by Lockett bind both the judge and jury under our law. We reject the state's argument that a new advisory jury upon resentencing is not constitutionally required under Florida's sentencing scheme. If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process is tainted by that procedure.

517 So.2d at 659.[20] In Mr. Elledge's case the sentencing judge expressly relied upon the jury's verdict in imposing the death sentence.[21]

The harm accruing to Mr. Elledge from the Hitchcock error in his case cannot be doubted. Almost the entire case in mitigation presented on behalf of Mr. Elledge depended upon consideration of nonstatutory mitigating factors.[22] Mr. Elledge testified that he was twenty-four at the time of the offense. 5C-304. His parents, who were migrant farmworkers, never established a permanent home. Id. During his childhood, his parents lacked concern for his upbringing and constantly argued with each other. 5C-306-307. His mother would "take it out" on the children by beating them with irons, skillets, pans, and other objects. 5C-306-307. When

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[20] The reasoning is also consistent with the Court's expressed analysis in Baldwin v. Alabama, 472 U.S. 372, 382 (1985)(unconstitutional jury proceedings may be error even though the judge is the final sentencer in a state like Florida "if the judge were obligated to accord some deference to [the jury's verdict]").

[21] The sentencing order concludes: "Based upon these findings of fact, and based further upon the advisory sentence rendered in this court by the twelve member jury, ... It is therefore the sentence of this Court ... that you ... be sentenced to Death." 2C-28-29.

[22] In Dugger's brief in the Eleventh Circuit he noted his agreement with this when he argued that "[m]uch of the mitigating evidence presented by Appellant was nonstatutory, i.e., Appellant's family background, abuse as a child, his drug and alcohol problems, his remorse and his ability to be rehabilitated." Answer Brief at 6, n.26.

he was only twelve years old, Mr. Elledge could no longer tolerate the abuse he was receiving, so he ran away from home in order to find a place where he could be treated normally. 5C-308. He described the trouble and consequent boys' school commitments he experienced in his early years, and his severe alcohol and drug abuse which began in those years and continued thereafter. 5C-308-311. In addition, he testified about his previous arrests and resulting psychiatric examinations, which had concluded that alcohol, drugs, and "temper problems" had led to his offenses. 5C-311-317.

With respect to the Strack homicide, Mr. Elledge testified that when he was arrested he decided to tell the police everything because he wanted to get professional help to try to understand how he could have done these things. 5C-335-338. Explaining that he knew he belonged in prison, Mr. Elledge testified that he had begun writing in the hope of preventing other young children from ending up as he did. 5C-340-342. Finally, Mr. Elledge expressed deep remorse for the homicide. 5C-343-344.

Petitioner Dugger has never once argued that the nonstatutory mitigating case presented by Mr. Elledge was insubstantial.[23] Plainly that evidence focusing as it does upon character and the core issue of capital sentencing, mental condition, is substantial. Most certainly it cannot be argued that the exclusion from consideration of Mr. Elledge's mitigating case "would have had no effect upon the jury's deliberations." Skipper v. South Carolina, 106 S.Ct. at 1673.

The judgment of the lower court is, therefore, supported independently by the violation of the principles of Hitchcock v. Dugger, supra in Mr. Elledge's sentencing trial.

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[23] Dugger's sole response to the Hitchcock argument in the Eleventh Circuit was to argue the now-rejected claim that the jury instructions were nonlimiting and that the judge was not limited, an argument that is both factually and legally incorrect.

III.

IF CERTIORARI WERE GRANTED, THE COURT WOULD CONCLUDE THAT MR. ELLEDGE IS ENTITLED TO THE RELIEF ALREADY GRANTED BY THE COURT OF APPEALS ON YET ANOTHER GROUND: INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

In the courts below, Mr. Elledge claimed that he was deprived of effective assistance of counsel in his sentencing proceeding because of his attorney's unreasonable failure to investigate and present a psychiatric mitigation defense, which was his only defense against the death penalty. In Mr. Elledge's view, reasonable counsel would have sought the assistance of a competent psychiatrist and interviewed members of the family in order to demonstrate that he suffered from psychosis, brain damage, and the effects of an abused and battered childhood at the time of the homicide.

The District Court held that "counsel's failure at least to interrogate Elledge's relatives and to seek an expert witness was outside the range of competent assistance," A-22; 823 F.2d at 1445, and the Eleventh Circuit agreed. Id. Even though, as the state argued, counsel was aware that no prior psychiatric evaluations had found that Mr. Elledge suffered from psychosis or organic brain dysfunction, he was nevertheless unreasonable in failing to investigate whether Mr. Elledge actually did suffer from these disorders. As the Eleventh Circuit explained,

> Elledge's counsel was convinced in 1975 that Elledge was 'crazy'; he continued to hold that conviction in 1977 (i.e., prior to the second sentencing hearing) despite two court-ordered psychiatric evaluations [in 1975] to the contrary. Counsel then discovered, in talking with Elledge, that prison authorities had been treating Elledge with Mellaril and Dilantin while he was incarcerated pending the 1977 sentencing hearing. Mellaril is an antipsychotic medication and Dilantin is an antiepileptic medication. Despite this new information, which supported his already held conviction that his client was 'crazy,' counsel did not seek new expert advice. Counsel's failure to pursue the issue, once its viability was renewed, was inadequate professional performance.

A-19-20 n.10; 823 F.2d at 1444-45 n.10. Accordingly, the Eleventh Circuit concluded, as the District Court had, that "counsel's total failure to investigate possible witnesses, both expert and lay, when he was aware of Elledge's past and knew that

mitigation was his client's sole defense, was unprofessional performance." Id. at 1445.

Even though the Eleventh Circuit determined that the "performance" prong of Strickland v. Washington's[24] ineffective assistance of counsel standard had been satisfied, it held that Mr. Elledge failed to demonstrate sufficient prejudice to warrant relief under Strickland. The court based this conclusion on two grounds: Mr. Elledge's failure to show that if counsel had conducted a reasonable investigation he would have found a favorable psychiatrist, A-24-31; 823 F.2d at 1445-47, and his failure to convince the district judge that the psychiatric mitigating evidence would have outweighed the aggravating factors in his case, A-31-37; 823 F.2d at 1447-48.

As we will show, the Eleventh Circuit erred in its reasoning. The first ground was flatly contradicted by the record, and the second ground misapplied Strickland's prejudice standard by approving the district judge's subjective assessment of the mitigating evidence as if he were the sentencer, rather than requiring that the evidence be assessed from the perspective of a reasonable juror. Had the record been read accurately and had the proper standard for assessing the effect of the unpresented mitigating evidence been applied, the Eleventh Circuit would have concluded that Strickland's prejudice showing had been satisfied, and that Mr Elledge was entitled to a new sentencing trial for this reason, as well as for the denial of due process occasioned by the shackling of Mr. Elledge during the sentencing trial.

A. The record demonstrates a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have produced an expert similar to the one produced in federal habeas proceedings.

In the federal habeas proceeding, Mr. Elledge presented the testimony of Dr. Dorothy Lewis, a psychiatrist who evaluated him in connection with that proceeding, to show the kind of expert testimony which trial counsel could have presented had he

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[24] 466 U.S. 668, 687 (1984).

conducted a reasonable investigation. The District Court fairly and accurately summarized Dr. Lewis' testimony as follows:

> Petitioner suffers from organic brain dysfunction, episodic rages, and paranoi[d] behavior. Dr. Lewis believes that Mr. Elledge becomes especially violent when he feels teased, tricked or in danger. She emphasized that, in her view, the combination of brain damage, witnessing extraordinary family violence, psychotic paranoia, and child abuse produced the disorder that affected Mr. Elledge during the Strack homicide. She felt that Mr Elledge's disorders caused a rage at the time of the homicide that was ungovernable and beyond his control.

R4-58-22.

In gauging the sufficiency of Mr. Elledge's showing of prejudice, the Eleventh Circuit correctly reasoned that Dr. Lewis' testimony had to be analyzed from two perspectives. First, "the court must determine whether it is reasonably likely that a reasonable attorney, operating under the circumstances of the case and acting in a reasonably professional manner, would have located such a witness." A-26-27; 823 F.2d at 1446. Second, the court must determine whether there is "a reasonable probability that, if adduced at trial, the psychiatric and background evidence presented in his habeas proceeding would have caused the sentencer to conclude 'that the balance of aggravating and mitigating circumstances did not warrant death.'" A-37; 823 F.2d at 1448 (quoting Strickland v. Washington, 466 U.S. at 695). The first of these concerns will be addressed in this section of Mr. Elledge's argument; the second, in the next section (III(B)).

The Eleventh Circuit determined that Mr. Elledge "made no showing that it was reasonably probable that an ordinary, reasonable lawyer, operating under the time and monetary constraints Elledge's counsel faced and using reasonable diligence, would have discovered a psychiatrist who would have testified as did Dr. Lewis." 823 F.2d at 1446-47. Had the Eleventh Circuit read the record accurately, it could not have reached this conclusion. Indeed, Mr. Elledge made the very showing the Eleventh Circuit mistakenly believed he had failed to make.

Mr. Elledge established three facts which, taken together,

demonstrated a reasonable likelihood that his counsel, with reasonable effort under the circumstances, would have been able to present psychiatric testimony similar to the testimony provided by Dr. Lewis. First, he demonstrated that Lewis' ultimate conclusion -- that he suffered "disorders" which "caused a rage at the time of the homicide that was ungovernable and beyond his control" -- was not, as the Eleventh Circuit mistakenly implied, an isolated opinion concerning him. Significantly, one of the two appointed psychiatrists who evaluated Mr. Elledge for purposes of competency and sanity before his first trial in 1975, made strikingly similar observations about him. While this psychiatrist, Dr. Taubel, was not asked to determine whether Mr. Elledge suffered from any disorder that might give rise to a mitigating circumstance as distinct from a competency or sanity defense, he nevertheless observed, as Dr. Lewis later would, that Mr. Elledge's capacity to reign in his anger, once triggered, was severely impaired:

> His behavior was undoubtedly psychologically determined in the sense that vast rage was directed towards the woman victim of his anger and his attacks upon the man were impulsive, insensible and ungoverned by any feeling of fright, apprehension or remorse.
>
> Perhaps the most tragic and yet at the same time alarming aspect to the defendant's personality is the fact that he is aware of these dangerous potentialities within himself and be knows his extremely limited capacity to restrain his anger and rage.

PX-1, at 3.[25]

During the federal evidentiary hearing, Dr. Lewis was asked to compare her observations and impressions about Mr Elledge with those of Dr. Taubel. She explained that she and Dr. Taubel were in agreement that Mr. Elledge's rage at Ms. Strack was behavior over which he had little control, but that they appeared to disagree about why he suffered such rages. As Dr. Lewis testified,

> I'm not sure that he [Dr. Taubel] is as, say, neurologically oriented, so that I can't say that he saw it [Mr. Elledge's rage] as evidence of central

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[25] Exhibits introduced in the federal evidentiary hearing are referred to as "PX" (petitioner's exhibit), followed by the exhibit number.

> nervous system dysfunction and episodic dyscontrol.
>
> I think that he saw it more as an unconscious kind of rage over which he had no control. I think his interpretation would be different.
>
> Also, he did not recognize his paranoia, so that I would say the area where we agree is that it was ungoverned and beyond his control, but the interpretation of why is different.

R6-70-260.

This essential observation about Mr. Elledge's episodes of uncontrollable rage had also been made earlier in Mr. Elledge's life, well before the Margaret Strack homicide. More than two years before Dr. Taubel evaluated Mr. Elledge, he was evaluated in relation to an aggravated assault charge in Colorado. Dr. Joseph Stapen, the psychiatrist who concluded that evaluation, reported his impressions as follows:

> Mr. Elledge has a childhood history of fighting, aggressiveness, and rebelliousness.... Mr. Elledge related that he is quite sensitive to feelings of intimidation and threatening challenges from others. He often reacts to a threat or challenge from another person with immediate release of defensive rage. He evidently feels so threatened at those times that his only defense is to strike first and immediately in order to stave off the unbearable anxiety of feeling threatened and potentially humiliated for backing down. He reported that he may react in such a way whether he is drunk, high, or sober.... One may argue ... that at times when he is acutely under the influence of large quantities of drugs or alcohol that his judgment is temporarily impaired and that his ability to refrain from doing the wrong is compromised. Mr. Elledge indicated that even when sober, however, there are times when he cannot control his response to a threat or intimidation.

PX-7, at 3.

When asked during the federal evidentiary hearing to compare her finding with those of Dr. Stapen, Dr. Lewis explained,

> This is exactly what I'm talking about. He simply didn't give a possible etiology for this, but he described this kind of paranoid, intense sense of threat and lashing out with no control, which to my mind, is a combination of psychotic reaction in a person who is organically impaired and can't control himself. He simply did not make the leap to why isn't that.

R6-70-263-64.

Accordingly, while no expert before Dr. Lewis had diagnosed Mr. Elledge as suffering from paranoid psychosis or brain damage, at least two other doctors had concluded before Dr. Lewis that he

experienced episodes of rage in which he could not control his behavior. Dr. Lewis explained these episodes as caused by psychosis and brain damage; the other doctors posited no explanation. Since the out-of-control rage episodes themselves were the basis for the psychiatric mitigation defense, however, their etiology was of only secondary importance. Mr. Elledge thus plainly established that if defense counsel had but looked, he would have found at least two psychiatrists who had already examined him and who had observed in him the same out-of-control episodes of rage which were the focus of Dr. Lewis' attention.

The second fact established by Mr. Elledge was that Dr. Lewis' theory for explaining the cause of his episodes--particularly the organic basis for them -- was an accepted theory in the psychiatric community when Mr. Elledge was tried. Despite the mistaken view of the Eleventh Circuit, the State did not contest this in the federal evidentiary hearing. During the course of argument at the close of the hearing, Mr. Elledge's counsel responded to an argument he thought counsel for the state had made, which drew into question the psychiatric community's acceptance of ideas like Dr. Lewis' at the time of the trial. Mr. Elledge's counsel took issue with such an argument:

> [T]here has been a suggestion by counsel for the state that the theoretical basis for Dr. Lewis' evaluation somehow wasn't available. She talked about DSM-II being the operative classification manual at the time of the trial and has suggested several times that the scientific basis for Dr. Lewis' opinion wasn't around in 1977.
>
> [M]y recollection from the testimony yesterday was that Dr. Lewis' testimony was to the contrary, and there is no evidence otherwise.
>
> Since that statement has been made by the state, however, I feel obliged to read to Your Honor from scientific works on forensic psychiatry, one dated 1958 and one dated 1974, because the state has made this a matter, and I feel as a matter of argument that I have to at least respond.

R7-71-56-57. Counsel for the state objected at this point and explained that Mr. Elledge's counsel had misunderstood the state's argument:

> I did not state that the evidence [w]as not available. I only talked about that in terms of what she testified as to Dr. Taubel's evaluation was based on DSM-II....

> I said DSM-II was the manual that was available in 1975. That's what I said. But I did not say [t]hat Dr. Lewis' ideas were not available. I said the manual that was available was DSM-II.

R7-71-57 (emphasis supplied).

The Eleventh Circuit erroneously read this exchange as the "State's counsel merely acknowledg[ing] that Dr. Lewis was extant in 1977 and had formulated her clinical theories at that time." A-26; 823 F.2d at 1446. The state plainly acknowledged more than this, however, for Mr. Elledge's counsel's professed concern was that counsel for the state "has suggested several times that the scientific basis for Dr. Lewis' opinion wasn't around in 1977." (Emphasis supplied.) When counsel for the state responded, "I did not state that the evidence [w]as not available," the "evidence" she plainly was referring to was the scientific basis for Dr. Lewis' opinion, not simply Dr. Lewis' personal opinion. Accordingly, the state did not contest that Dr. Lewis' theory for explaining the cause of Mr. Elledge's rage episodes was an accepted theory in the psychiatric community when Mr. Elledge was tried.

Moreover, the Eleventh Circuit should have taken judicial notice that the theory underlying Dr. Lewis' evaluation was well accepted in the psychiatric community at that time.

The theory underlying Dr. Lewis' evaluation was a rule of differential diagnosis. The rule recognized (a) that a person's violent, antisocial behavior could be the product either of a major mental disorder, such as psychosis or organic brain dysfunction, or of personality disorder, and (b) that personality disorder alone could not be accurately ascribed as the cause without first ruling out psychosis and organic deficits as contributing factors. In criminal cases, the differentiation of these causes of antisocial behavior is of crucial importance, since personality disorder-caused antisocial behavior is behavior for which the individual is generally held legally responsible, while organically-or-psychotically-caused antisocial behavior is behavior for which an individual is often not held fully responsible. By the time Mr. Elledge was tried in 1977, the rule

of differential diagnosis utilized by Dr. Lewis was well-accepted. See, e.g., R. Slovenko, Psychiatry and Law 400 (1973); S. Arieti, American Handbook of Psychiatry 1161 (2d ed. 1974). For this reason, a leading forensic psychiatrist cautioned, as early as 1958, that

> epilepsy [or other brain dysfunction] should always be considered in the psychiatric examination of the suspected criminal.... The associated personality disorder [accompanying temporal lobe epilepsy] is not infrequently characterized by aggressive antisocial behavior. In persons with a long history of antisocial conduct, it is especially easy to overlook the possibility of a temporal lobe lesion....

J. MacDonald, Psychiatry and the Criminal 102-03 (1958).

The third fact established by Mr. Elledge was that defense counsel understood the significance of the new facts he learned from Mr. Elledge just before the 1977 trial and because of this, reasonably would have looked for an expert such as Dr. Lewis. Counsel learned from Mr. Elledge that he had been treated in prison with an antipsychotic medication (Mellaril) and anti-epileptic medication (Dilantin). Counsel knew that the accepted medical use of these drugs was for the treatment of psychosis and epilepsy. Accordingly, the information gave him critical facts upon which to initiate new investigation. In the course of that investigation, he certainly would have encountered, as Dugger noted in the Eleventh Circuit, the prior diagnoses of personality disorder. However, as Dr. Lewis explained in the District Court, all of the medical and institutional records underlying these diagnoses also documented symptoms consistent with a diagnosis of organic brain damage and psychotic paranoia.[26] Thus, since

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[26] For example, the following signs of psychotically paranoid behavior were noted throughout Mr. Elledge's psychiatric history: his inability to function appropriately in the classroom due to frequent fights with students and altercations with teachers, PX-6, at 5-8, which Dr. Lewis explained as a common precursor to psychotically paranoid behavior, R6-70-115-16; his experience of numerous paranoid feelings and his involvement in numerous psychotically paranoid incidents throughout his childhood and adult years, during which he lashed out at those whom he perceived as threatening, despite the objectively minor threat posed by such people, PX-6, at 7-8; PX-7, at 3; see R6-70-118-19. Further, Mr. Elledge's psychiatric records documented many of the hallmark symptoms associated with organically-induced rages, including insignificant provocation for such rages, PX-7, at 3; an aura before rage episodes, id.; an inability to control his behavior during such episodes, id.; and

defense counsel's investigation would have been focused on organic dysfunction and psychosis, he and any expert he engaged would have been looking for and likely would have found these significant facts. Indeed, defense counsel himself testified in state post-conviction proceedings that if he had investigated in light of the new information concerning Mr. Elledge's in-prison treatment, he "[c]ertainly" would have found evidence to present. 1R-33-34.

In light of these record facts, the Eleventh Circuit was simply wrong when it concluded that Mr Elledge made "no showing that it was reasonably probable that an ordinary, reasonable lawyer, operating under the time and monetary constraints Elledge's counsel faced and using reasonable diligence, would have discovered a psychiatrist who would have testified as did Dr. Lewis." 823 F.2d at 1446-47. To the contrary, Mr. Elledge showed that other psychiatrists, one of whom evaluated him in connection with the Strack homicide, another of whom evaluated him well before then, had developed strikingly similar impressions about his severely impaired ability to restrain his violent behavior. He showed as well that Dr. Lewis' theory for explaining why his capacity for self-restraint was so impaired was well-accepted in the psychiatric community at the time of his trial. And finally, he showed that defense counsel was peculiarly attuned to finding a psychiatrist who would have testified like Dr. Lewis. Accordingly, Mr. Elledge more than satisfied the burden which the Eleventh Circuit mistakenly found he failed to carry.

B. The record demonstrates a reasonable probability that if counsel had performed effectively, the outcome of Mr. Elledge's sentencing trial would have been different.

To determine whether Mr. Elledge had shown a "reasonable probability that ... the result of the proceeding would have been different," Strickland v. Washington, 466 U.S. at 694, the Eleventh Circuit utilized an analysis that is wholly at odds with

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a feeling of relief or gratification after the rages subsided, PX-6, at 7. See R6-70-123-31.

Strickland's prescribed analysis. Instead of determining whether a reasonable sentencer could have been persuaded by the evidence adduced in the federal habeas hearing to impose life, the Eleventh Circuit simply determined that the sentencer would not have been so persuaded in Mr. Elledge's case because the District Court was not. It utilized a process of analysis which allows the District Court to make a subjective evaluation of the evidence, and if the District court is not persuaded that it would have sentenced the petitioner differently, permits the conclusion that prejudice has not been established. As the Eleventh Circuit explained,

> [A] careful reading of the district court's order shows that the court -- acting within its discretion as factfinder -- gave little weight to the testimony of Dr. Lewis as well as that of Elledge's family members. The district court simply found that no significant mitigating evidence was adduced. Further, when the court weighed the value of Dr. Lewis's testimony, it found that the aggravating factors outweighed those presented in mitigation.

A-35-36; 823 F.2d at 1448. To show that the District court had exercised its factfinding discretion reasonably, the Eleventh Circuit catalogued the various reasons why the district court could reasonably have found the facts as it did. A-32-33; 823 F.2d at 1447-48.

This analysis fundamentally misapplies Strickland's prejudice analysis. Strickland directs reviewing courts to assess the value of the omitted evidence from the perspective of the sentencer, not from the perspective of a reviewing judge who subjectively evaluates the evidence as if he or she were the sentencer. "[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695 (emphasis supplied). As the Ninth Circuit has astutely observed in the application of Strickland's prejudice test in the context of the state's withholding of favorable evidence,

> The inquiry is not how this or any other judge, as the trier of fact, would subjectively evaluate the evidence. It is, rather, how the absence of the evidence objectively might have affected the outcome of

the trial.

Bagley v. Lumpkin, 798 F.2d 1297, 1301 (9th Cir. 1986) (after remand)(emphasis added). Ironically, the Eleventh Circuit has itself recognized and followed this rule in other cases, noting in Brown v. Wainwright, 785 F.2d 1457, 1466 (11th Cir. 1986), that the test is whether the omitted evidence "could reasonably have led a jury to disbelieve" the accusations of the state's chief witness, and in Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984), cert. denied, 470 U.S. 1087 (1985), whether in light of the omitted evidence, "the choice between the two interpretations would have been one the jury could have made either way had they heard the facts."

Thus, even if the sentencer in Mr. Elledge's case could have given little weight, as the District Court did, to Dr. Lewis' and the family members' testimony, for the reasons catalogued by the Eleventh Circuit

> -- "[t]he value of Dr. Lewis's testimony was undercut in part by the revelation that her analysis largely relied on Elledge's recitations and had not been fully corroborated by independent follow-up investigation," A-32; 823 F.2d at 1447;
>
> -- "the two court-appointed psychiatrists who examined Elledge each gave damaging evaluations that would have diluted Dr. Lewis's impact," id.; and
>
> -- "much of the testimony elicited from Elledge's brother and sister could be used against him" -- because of his violence in contrast with their "emergence as normal citizens even though they had been subjected to similar abuse and neglect," A-32-33; 823 F.2d at 1447

-- the court should have found that Mr Elledge had nevertheless met his burden under Strickland if the sentencer just as reasonably could have given considerable weight to Dr. Lewis' and the family members' testimony. Because of its misapplication of Strickland, however, the Eleventh Circuit failed to consider whether the sentencer reasonably could have done this. Had the Eleventh Circuit considered the evidence from the proper perspective, it would have been compelled to find that the

sentencer could have.

There are three reasons for this:

First, as we have already shown, the two court-appointed psychiatrists' evaluations were not necessarily "damaging" and would not necessarily have "diluted Dr. Lewis's impact." Indeed, at least one of the two agreed with Dr. Lewis that Mr. Elledge suffered from the episodic, uncontrollable rages, which were at the heart of what could have been Mr. Elledge's psychiatric mitigation defense. Even if neither of the psychiatrists agreed with Dr. Lewis that these rages were caused by psychosis and brain damage, their agreement that the rages were uncontrollable could, in a reasonable sentencer's view, have established the defense as a weighty defense.

Second, the Eleventh Circuit's finding that Dr. Lewis' analysis "largely relied on Elledge's recitations and had not been fully corroborated by independent follow-up investigation" -- and the implication from this that her analysis was unreliable -- is manifestly subject to dispute. Reasonable jurors could as readily have found that her analysis of Mr. Elledge was the most reliable ever conducted. Indeed, it was patently clear in the District Court that Dr. Lewis undertook the most thorough evaluation that has ever been undertaken of Mr. Elledge--spending significantly more time interviewing him[27] and gathering, as a result, much more data from him, than any previous forensic psychiatrist; examining his history more thoroughly than any other previous psychiatrist;[28] corroborating for the first time by sources independent of Mr. Elledge the

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[27] Dr. Lewis' clinical interview took nine hours, conducted in three sessions over the course of two days. R4-58-21. In contrast, Dr. Eichert and Dr. Taubel spent one hour interviewing Mr. Elledge together. PX1, at 1.

[28] Most of the data gathered by Dr. Lewis was not known by the other forensic psychiatrists who have previously evaluated Mr. Elledge, and that data was crucial to the formulation of Dr. Lewis' opinion. See R6-70-98-138. A compilation of this data was provided to the District court at R5-79-6-7. See also R5-74-27-32 (referenced at R5-79-6-7).

accuracy of his social/psychiatric history;[29] and utilizing for the first time in a forensic evaluation of Mr. Elledge additional diagnostic tools beyond the standard psychiatric interview and review of history (e.g., neurological examination, psychological evaluation, and educational evaluation).[30]

This thoroughness was reflected in Dr. Lewis' testimony before the District Court. Dr. Lewis did not just give her clinical and forensic conclusions. She explained why it was necessary to collect the data that she gathered in relation to Mr. Elledge. R6-70-94-98. She noted every piece of data upon which she relied and indicated whether and how she had been able to verify the accuracy of the data. R6-70-98-138.[31] She then explained the medical/clinical significance of every piece of data and how that data supported her diagnosis of Mr. Elledge. Id. In light of her clinical impressions, Dr. Lewis described how Mr. Elledge's psychiatric illness and neurological damage contributed to his behavior during the Strack homicide, R6-70-140-141, and how these disorders severely impaired his capacity to conform his behavior to the requirements of law at that time, R6-70-140-141. Finally, she explained in full why she disagreed with the diagnosis of Mr. Elledge as suffering solely from an antisocial personality disorder. R6-70-142-146.

In sum, Dr. Lewis did exactly what a competent psychiatrist is expected to do in a forensic setting to "enable the [factfinder] to make its most accurate determination of the truth

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29 See R5-74-27-32 (referencing to the evidentiary record before the District Court the data and the means by which the data were verified independent of Mr. Elledge).

30 See R6-70-91.

31 During the course of the testimony before the District court, one of the pieces of data provided by Mr. Elledge -- which Dr. Lewis had been unable to verify -- turned out to be in dispute. Connie Wright (Mr. Elledge's sister) disputed Mr. Elledge's statement to Dr. Lewis that she had initiated and continued a pattern of sexual relations with him. R6-70-24. Dr. Lewis explained how the conflict between Ms. Wright and Mr. Elledge over this series of events did not call into question her opinion respecting Mr. Elledge. R6-70-110-113. More importantly, Dr. Lewis testified that she had been able to corroborate most of the significant data provided by Mr. Elledge through sources independent of him. R6-70-98-138.

on the issue before [him]," Ake v. Oklahoma, 470 U.S. 68, 81 (1985): she "organiz[ed] [Mr. Elledge's] mental history, examination results and behavior, and other information, interpret[ed] it in light of [her] expertise, and then lay[ed] out [her] investigative and analytic process to the [Court]...." Id. The reasonableness of her conclusions are thus self-evident and self-explanatory.[32]

Third, the sentencing jury and judge could reasonably have credited the psychiatric evidence notwithstanding that, at first blush, as the District Court and the Eleventh Circuit observed, this evidence might have appeared to be more "aggravating" than "mitigating" -- because it painted a picture of Mr. Elledge "as a violent, aggressive and dangerous person even when he was a child," R4-58-25, and because it portrayed Mr. Elledge in an unsympathetic light in comparison to his sister and brother who grew to be "normal, law-abiding citizens, despite the abuse they suffered as children [along with petitioner] from their mother in a hellish household...."Id.

While it is accurate that Mr. Elledge's history reveals "a violent, aggressive, and dangerous person even [as] a child," the view of this history as aggravating changes when it is understood that this very history -- like the homicide of Ms. Strack -- is symptomatic of Mr. Elledge's illness, not bad character. As Dr. Lewis explained, one of the reasons that she was certain that her

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[32] While Mr. Elledge was required only show that Dr. Lewis' conclusions could reasonably have been credited in the sentencing process, he has in fact shown more than that. In contrast to the one-hour interview of Mr. Elledge that formed the entire data base for Dr. Taubel's and Dr. Eichert's evaluation, Dr. Lewis has gone to extraordinary lengths to collect, and confirm the accuracy of, all relevant data. While the depth and breadth of the evaluations conducted by Dr. Taubel and Dr. Eichert could have been discredited as "inadequate to serve as a basis for such a serious determination," Hays v. Murphy, 663 F.2d 1004, 1011-13 (10th Cir. 1981)(describing some of the elements of an adequate forensic evaluation); see also United States v. Taylor, 437 F.2d 371, 378 & n.10 (4th Cir. 1971); Rollerson v. United States, 343 F.2d 269, 274-75 (D.C. Cir. 1964); Jones v. United States, 327 F.2d 867, 879-80 (D.C. Cir. 1963), Dr. Lewis' evaluation -- when judged by the same standards -- could not have been discredited but could have been given only the highest credit. Accordingly, Dr. Lewis' conclusions could have been shown not only to be reasonable, but to be the most reasonable of the competing psychiatric conclusions, if there had been any.

evaluation of Mr. Elledge was accurate was that he evinced a life long history of out-of-control violent behavior. R6-70-119. The violent acts described by Mr. Elledge's sister and brother were extremely significant in Dr. Lewis' opinion for two reasons. First, the violent acts quite often were triggered by paranoid misperceptions: "As one probed some of the violent episodes that had occurred, it became clear that many had been in the context of feeling teased or tricked or betrayed or in danger." R6-70-119-120. Second, once begun, Mr. Elledge's violent acts bore the unique hallmarks of organically-influenced behavior: the acts would appear to others as out-of-control and would not be remembered by Mr. Elledge for some time thereafter. R6-70-124, 141. Far from aggravating the picture of Mr. Elledge, therefore, these incidents could have further corroborated a reasonable sentencer's view that Mr. Elledge was genuinely subject to out-of-control episodes of violent rage like the one that led to the homicide of Ms. Strack.

Moreover, while Connie Wright and Daniel Elledge have apparently been able to lead responsible, law-abiding lives, despite also having been exposed to abuse from their mother, the evidentiary presentation in the District Court thoroughly explained how this could be so for Connie and Daniel, but not for Bill. As Dr. Lewis explained, despite their growing up in the same household, Connie and Danny did not suffer the same disabilities that Bill suffered, which led to his violent behavior. R6-70-148-151. Connie and Danny did not suffer from any psychotic thinking or behavior. R6-70-39, 57, 151. Despite having been battered and emotionally abused, "the battering that [Connie and Danny] ... received was nowhere near the quality of battering that [Bill] received...." R6-70-149. See also R6-70-17, 114-115 (testimony of Connie Wright and Daniel Elledge). Connie and Danny never suffered any head injuries similar to those suffered by Bill. R6-70-39, 58, 151. Similarly, Connie and Danny never suffered any memory lapses like Bill. R6-70-39, 58. These differences are what account for Bill's violence and

Connie's and Danny's lack of violence. R6-70-148-151.

Accordingly, although the factors cited by the Eleventh Circuit in concluding that the District Court could reasonably have found that the psychiatric mitigation evidence had "little weight," A-35; 823 F.2d at 1447, might reasonably have led the jury and judge to reject the evidence of psychiatric mitigation, the countervailing factors discussed herein could just as reasonably have led the jury to credit the evidence of psychiatric mitigation. "[T]he choice between the two interpretations would have been one of the jury [and judge] could have made either way had they heard the facts." Smith v. Wainwright, 741 F.2d at 1225. Because the jury's choice could well have "alter[ed] the entire evidentiary picture," Strickland v. Washington, 466 U.S. at 696, Mr. Elledge "has met the burden of showing that the decision reached would reasonably likely have been different absent [counsel's] errors." Id.

The Court could, accordingly, quite readily decide that defense counsel's ineffectiveness is yet another reason -- though rejected by the Eleventh Circuit -- supporting the final judgment of the Eleventh Circuit in Mr. Elledge's case.

CONCLUSION

For these reasons, the Court should deny Dugger's petition for a writ of certiorari.

March 11, 1988

Respectfully submitted,

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